

## THE CONCEPT OF FUNDAMENTAL RIGHTS: THE INDIAN AND NIGERIAN PERSPECTIVE

Saheed Qudus Olamilekan\*

### INTRODUCTION

Most students of human rights trace the origin of the concept to the Greco-Roman periods, following the widespread influence and development of Stoicism<sup>1</sup>. According to the Stoics, human conduct should be judged, determined, and brought into harmony with the law of nature. A classic example of this view was given by Cicero in his *De Republica* when he proclaimed that “law in the proper sense is right reason in harmony with nature.” These laws are not in a state of constant flux or evolution and are not even subject to legislative, executive, or judicial review – as we have it today. It is one and the same, everywhere you find yourself. According to him, “there will not be one such law in Rome and another in Athens, one now and another in the future, but all peoples at all times will be embraced by a single and eternal unchangeable law.” Similarly, the Roman law also embraced the natural law theory (which was already growing at a fast pace among its intellectuals and citizens) in accordance with *jus gentium* (“the law of nations”). It is accorded to the natural law, certain basic, inalienable and eternal rights, that goes beyond the rights of citizenship (accorded to Romans under the Roman law). Accordingly, the natural law is that which the law of nature and not the Roman law, accords to every human being – Roman or not.<sup>2</sup> However, in modern day democracies, the idea of the incorporation of citizens’ rights or the rights of man dates back to the United States Independence Constitution of 1776. In its preamble, it describes these rights as being the “inalienable rights” endowed by God, upon every human being. It states thus:

“We hold these truths to be self-evident that all men are created equal. That all men are endowed by their creator with certain inalienable rights. That among these are life, liberty, and the pursuit of happiness.” This declaration was swiftly followed by the French Declaration of

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\*LAW STUDENT, UNIVERSITY OF LAGOS.

<sup>1</sup> Stoicism is a school of thought or philosophy that stresses on the importance of the *logos* or *reason* or *natural law*, in alleviating human suffering. The proponents of this School of thought are called Stoics.

<sup>2</sup> Despite the widespread of the natural law theory during the Greco-Roman periods, the theory was only associated with “duties”, rather than the “rights” of man. It was not until the Middle Ages that natural law became associated with natural rights, following: the fall of European feudalism, the teachings of modern natural law theorists (such as Aquinas and Hugo Grotius) and the rise of the Renaissance Age.

the Rights of Man<sup>3</sup> and the British Bill of Rights.<sup>4</sup> The impact of these instruments was so profound that it invoked the attention of emerging democracies and became an anchorage for the national government to take part in removing the anti-social practices that would deter the fulfillment of political, civil, and cultural conditions, which threatened the legitimate aspirations and dignity of man.<sup>5</sup>

The term 'Human Rights' is a post second World War creation, which emerged in the public in 1942 and was given recognition by a comity of nations, shortly after the Second World War. It was the principle upon which the post-war international organization – the United Nations Organization – was to be based.<sup>6</sup> And, at the founding of the United Nations, the phrases 'natural rights' and 'the rights of man', were quickly substituted with the term 'human rights'.<sup>7</sup> This development led to the incorporation of enforceable and non-enforceable rights<sup>8</sup> in the constitutions of emerging democracies- with the Spanish Constitution of 1931, being the first constitution of the 20<sup>th</sup> Century to incorporate this array of rights. This was followed by the 1934 Constitution of the Republic of Ireland and the 1949 Constitution of the Republic of India.

### THE MEANING OF HUMAN RIGHTS

The term human rights are defined by the Black's Law Dictionary as: "The freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live."<sup>9</sup>

These rights have been referred to as the inalienable, inherent, or fundamental rights. The Universal Declaration of Human Rights 1948,<sup>10</sup> in its preamble, states that the "recognition of the inherent dignity and of the inalienable rights of all members of the human family is the

<sup>3</sup> This declaration was made, following the French Revolution of 1789

<sup>4</sup> The British Bill of Rights was the result of the Glorious Revolution in England.

<sup>5</sup> Bhalla, R. S. (1988). *Essays in Constitutional Law*. Jos: University of Jos Press

<sup>6</sup> Incorporation of Fundamental Objectives and Directive Principles of State Policy in the Constitutions of Emerging Democracies: A Beneficial Wrongdoing or a Democratic Demagoguery?. Eje Adakole Odiye, Hemen Philip Faga, Iruka Wilfred Nwakpu. Faculty of Law, Ebonyi State University, Abakaliki, Nigeria.

<sup>7</sup> This was made possible with the documentation of these internationally-recognized rights in the Universal Declaration of Human Rights (UDHR), in 1948. This progression was swiftly followed by the documentation of these rights in other similar international statutes such as: the United Nations Covenant on Civil and Political Rights, 1966 and the United Nations Convention on Economic, Social and Cultural Rights, 1966.

<sup>8</sup> The non-enforceable rights are couched under the name 'Fundamental Objectives and Directive Principle of State Policy'. These 'specie' of rights are made 'injusticiable' (I.e., unenforceable) in most countries that have included them in their constitutions. Although, some countries have made them 'justiciable', indirectly – mostly through judicial activism.

<sup>9</sup> Black's Law Dictionary, Ninth Edition

<sup>10</sup> The Universal Declaration of Human Rights, 1948, have been described by Thomas Buergenthal et al., as "the first comprehensive human rights instruments to be proclaimed by a universal International organization."

foundation of freedom, justice, and peace of the world.” Human rights represent the basic values common to all cultures and must be respected by countries worldwide.<sup>11</sup> In other words, human rights are at the core of International law and relations. Under the Indian Protection of Human Rights Act, 1993, the term ‘human rights are defined as “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.” Human rights are, therefore, the basic rights enjoyed by every person irrespective of the dictate of the law.<sup>12</sup> And these rights apply to every human being, irrespective of race, gender, sex, ethnic/tribal affinity, or any other consideration. These are the rights and privileges held by all persons universally, eternally, and equally, of which a violation of such rights would therefore be a failure to recognize the worth of life.<sup>13</sup> These rights are not relinquished by the citizens due to the ‘social contract’ entered into with the state and can be enforced against the state, in case of any violation. Thus, Article 13(2) of the Indian Constitution<sup>14</sup> prohibits any state from making any law in violation of the fundamental rights of persons contained in Part III of the Constitution. It provides that if any part of the law made, is against the fundamental rights provisions, such law would be declared null and void. The question of whether or not any of the fundamental rights not contained in the Indian Constitution is applicable in India is a long standing one. To this, the apex court of India in the case of *A.D.M. Jabalpur v. Shiv Kant Shukla* replied that the law of the land does not recognize any other fundamental rights, except those specifically provided for under the Indian Constitution. However, commenting on the Universal Declaration of Human Rights (UDHR), the apex court of India declared in the case of *Keshvanda Bharti v. State of Kerala*<sup>15</sup> that: “The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time the Constitution was adopted.” Also, in the case of *Chairman, Railway Board & Ors. v. Chandrima Das & Ors.*, it was held that the UDHR, being a global model code of conduct would be applicable in India, when necessary.

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<sup>11</sup> THE CONCEPT OF HUMAN RIGHTS LAW IN INDIA AND INTERNATIONAL ARENA. R. M. Kamble Assistant Professor, Sir Siddappa Kambali Law College, Karnatak University, Dharwad, Karnataka-580001.

<sup>12</sup> That is to say, these rights are not (necessarily) a conferment by any written law and cannot be taken away by any such law. This means that they are rights every person inherits, by virtue of their humanity.

<sup>13</sup> <http://www.legalservicesindia.com/law-india/Human-Rights-law-in-India.htm>

<sup>14</sup> The Constitution of India, 1950, Article 13(2).

<sup>15</sup> *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, ¶40 (per A.N. Ray J.). On the general question of whether or not Part III of the Constitution of Indian (containing the Fundamental rights) could be abrogated by the parliament. A majority (9 to 4) of the Supreme Court answered by saying that though, no provision of Part III can be abrogated, but a reasonable abridgement could be effected by the parliament, based on public interest.

## FUNDAMENTAL RIGHTS: THE NIGERIAN PERSPECTIVE

It is trite that the foundation of every democracy is the rule of law and the rule of law would not be deemed to have been upheld if the fundamental rights of persons are infringed upon. These fundamental rights (i.e., the basic rights enjoyed by every human) are protected by every state all over the world. As a democratic nation, these rights have also been incorporated in the constitution of Nigeria<sup>16</sup>, under Chapter IV.<sup>17</sup> As part of the international community, Nigeria is also a signatory to (and has ratified/domesticated) several international treaties that have also incorporated these rights.<sup>18</sup>

The issue of fundamental rights has continued to feature prominently in Nigerian courts as there is increasing awareness to uphold (and protect) fundamental rights in Nigeria, after years of the military junta and consequently, infringement on fundamental rights. These rights, no doubt, have received legal and constitutional backing.<sup>19</sup> Due to the constitutional nature of these rights, they are considered *sui generis* (claims of their own distinct kind) and enjoy distinct procedural and fast-tracked time frames of litigation.<sup>20</sup> This simply places these rights on a higher pedestal than ordinary civil claims, in which injury has to be proved for damages to be awarded by any Nigerian court of law. For the purpose of enforcement of these rights, the principal source of practice and procedure is the Fundamental Rights (Enforcement Procedure) Rules, 2009<sup>21</sup>, which repealed the Fundamental Rights (Enforcement Procedure) Rules, 1979. The FREP Rules, 2009, were made pursuant to Section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999. And on the mode of enforcement, Order II Rule I of the FREP Rules, 2009, provides that:

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<sup>16</sup> The Constitution of the Federal Republic of Nigeria, 1999.

<sup>17</sup> Chapter IV of the Constitution of the Federal Republic of Nigeria is titled "Fundamental Rights" and consists of Sections 33 – 46.

<sup>18</sup> Nigeria is a signatory to international treaties such as the UDHR 1948, International Covenant on Civil and Political Rights, International Convention on Economic, Social and Cultural Rights 1966, etc. Other treaties (such as the African Charter, Child's Rights Act, etc) have been domesticated in Nigeria by virtue of Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (on domestication of international treaties in Nigeria). See Alo on domestication of international treaties, the case of General Sani Abacha & Ors v. Fawehinmi (2000) NWLR (pt.660) p.247

<sup>19</sup> See Chapter IV (Sections 33 – 46) of the Constitution of the Federal Republic of Nigeria, 1999 and the Fundamental Rights (Enforcement Procedure) Rules, 2009.

<sup>20</sup> Challenges In Enforcement Of Fundamental Rights In Nigeria. Okorie Kalu , Eric O. Otojahi , Peter Edokpayi and Chinenye Ene. <https://www.mondaq.com/nigeria/human-rights/986460/challenges-in-enforcement-of-fundamental-rights-in-nigeria>

<sup>21</sup> Also popularly known as FREP Rules, 2009

“any person who alleges that any of the fundamental rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may apply to the court in the state where the infringement occurs or is likely to occur for redress.” This means that anybody, whose rights have been or are likely to be infringed upon, can apply to any court of law in Nigeria (be it the Federal or State High courts)<sup>22</sup>, using any originating summons acceptable to the court without obtaining any leave of court.<sup>23</sup>

Therefore, not only do fundamental rights have strong legal and constitutional backing in Nigeria, but they have also received the unwavering support of the judiciary and still continue to do so.<sup>24</sup> One example of such is in the age-old case of *Ransome Kuti v. Attorney-General of the Federation*<sup>25</sup>, in which the court, per Kayode Eso, JSC, declared that the Fundamental Right “is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence.” In addition, similar pronouncements on have been made – in hundreds of cases - by the Nigerian courts in protection of the sanctity of these rights.<sup>26</sup>

## CONCLUSION

Fundamental rights are those rights accruing to every human being, irrespective of whether or not they have been conferred upon by the law of the state, as they can be enforced against the state in case of its infringement. This has, therefore, led to its incorporation into every country's national - and international – legal instruments. For example, both the Nigerian constitution and the Republic of India Constitution, have endorsed these fundamental rights in their provisions, under Chapter IV and Part III, respectively. However, mere documentation of these rights cannot ensure their maximum protection under these constitutions. It is, therefore, imperative that the three arms of government – the judiciary especially – as well as the citizenry, are held accountable for the protection of these rights as its ultimate custodians.

<sup>22</sup> See *Jim Jaja. V Commissioner of Police, Rivers State* (2013) 6 NWLR (Pt.1350) S.C 225.

<sup>23</sup> Formerly, applicants alleging a breach of their fundamental rights were usually compelled to obtain the leave of the court before the matter can be heard. This has now been abolished by the current FREP Rules, 2009.

<sup>24</sup> This is so because, the sanctity and of these rights are vested in the courts of law by virtue of Section 46(1) & (2) of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>25</sup> *Ransome-Kuti vs. The Attorney General Federation* (1985) 2 NWLR (PT. 6) 211

<sup>26</sup> See few of the cases for greater judicial exposition on Fundamental Rights: *Iheme v. Chief Of Defence Staff & Ors*; *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010); *Chijiuka v. Maduewesi* (2011) 16 NWLR Pt. 1272; *Enukeme v. Mazi* (2014) LPELR - 23540 (CA); *Emeka v Okoroafor* (2017) 11 NWLR (Pt. 1577) SC 410; *National Electric Power Authority v. Edegero* (2002) 18 NWLR (part 789) 79; *Adegbite & Anor. v. Amosu* (2016) LPELR 40655 (SC); *Gbenga Komolafe V AGF* 1 NPILR 407; *Clement v. Iwuanyanwu* (1989) NWLR (Pt. 107) 39.